No. 14415

United States
Court of Appeals
For the Ninth Circuit

HENRY A. KUCKENBERG, HARRIET KUCKENBERG, and LAWRENCE KUCKENBERG, Doing Business As KUCKENBERG CONSTRUCTION CO.,

Appellants,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation,

Appellee.

Appellee's Brief

Appeal from the United States District Court
For the District of Oregon.

James Arthur Powers,
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Portland 1, Oregon,
Attorney for Appellee.

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In the beginning the United States Public Roads Administration arranged to relocate an old mountain road which originally was part of the north branch of the Santiam Pass which crosses the Cascade Mountain Range in Oregon. A portion of the old road was to be relocated upon the side of a mountain ravine. The Southern Pacific Company had a branch line at the bottom of the ravine paralleling a river at some points; it was anticipated that damage would be done to the railroad, and provisions were made in the contract with respect to preventing damage and interference with the operation of trains as far as possible. At two points especially, where expense items were incurred by the appellants for repairing the track and roadbed, damage was felt to be unavoidable because of the precipitous mountain side which was sharply beyond the angle of repose.

At the principal points where the damage occurred, the contractors used the railroad tracks and roadbed as a detour for vehicular traffic and built planking over it. The blasting on the side of the mountain caused rocks and other debris to continue to fall on the track, and the contractors in their operation kept a bulldozer and other equipment along this detour in order to push the debris off the roadbed. This material falling or rolling onto the track would be shoved off, generally into the river paralleling the roadbed. Rails and ties

and other materials were kept on hand to repair the track in order to keep the railroad in operation. Part of the contract price was to cover such damage and the cost of keeping the track free from debris, and the appellants agreed to pay for all damage to the track and roadbed of the railroad. The pertinent portions from the bid proposal and contract covering these matters follow:

Exhibit No. 1, p. D-4—

> "Contractor shall protect Railroad against damage to telegraph, telephone and signal lines (including telegraph and telephone lines of The Western Union Telegraph Company located upon railroad right of way), roadbed, ballast, ties, and/or track. Any work of this character which railroad may be required to do on account of or for the purpose of accommodating the work of Contractor shall be done by Railroad at the expense of Contractor, and Contractor shall reimburse Railroad upon rendition of bills therefor for all expense incurred by it in: (a) repairing damage to railroad structures, telephone, telegraph and signal lines (including telephone and telegraph lines of The Western Union Telegraph Company located upon Railroad property) and (b) repairing damage to roadbed, ballast, ties and/or track."

Exhibit No. 1, p. D-6—

> "Between Stations 691-85 and 714-50, Unit B, the roadway excavation involved is in such close proximity to the railway company tracks that some

interference with the continuous operation of the railroad and possible damage to its facilities would seem to be unavoidable. At this or any other points where similar conditions exist the contractor shall keep the engineer and the railway company fully informed of his plans and shall cooperate in their modification and execution to the end that such unavoidable interference and/or damage may be held to a minimum. Railroad operation shall be restored at the earliest practicable moment either by temporary shoofly construction or by restoration of the now existing condition. Any damages or costs involved which result from such construction operations shall be at the expense and responsibility of the contractor."

(p. D-9) Protection of Railroad and Existing Highway During Construction—

"Construction shall be performed by methods which will result in the least possible damage to the adjacent railroad and to the existing road. **Blasting** shall be done in such manner that the materials will, so far as practicable, remain in place within the proposed road prism. **Any** materials or debris falling onto **either facility** shall be removed, and any damage to the roadbed or track immediately corrected. Broken rail, damaged ties and fouled ballast shall be replaced in a workmanlike manner. A stock of ties, rail, telephone and telegraph line and supplementary supplies shall be kept in stock on the project at all times to facilitate repairs."

"The contract unit price shall include full compensation for all special work necessary in blast-

ing and excavation of the material to prevent damage to the railroad and any work necessary in removing debris unavoidably dropped on the roadbeds of the railroad and existing highway and for the correction of any damages to those facilities or to the telephone and telegraph lines."

During the summer of 1947 when the anticipated damage began to occur under the foregoing provision of the contract the railroad company made the repairs and billed the appellant contractors in accordance with the foregoing provision. Thereafter the railroad and the contractors entered into an agreement at the request of the contractors whereby the contractors with their own equipment on the job would repair the damage as it occurred, and this is what was done. Long after, there was a long list of items covering the cost of appellants' operations in repairing damage and keeping track clear furnished to the insurance company by the appellant contractors which they later claimed were caused by accident. Appellee insurance contracts issued to appellants were in effect from May 14, 1948, to July 29, 1948. On July 6, 1948, it was reported to appellee that these bills were being presented ". . . in anticipation of offset against any future claims which the Southern Pacific might bring against Kuckenberg. Mister Souther advises there is no thought of litigation in the minds of either Kuckenberg or himself as respects Hartford contracts." (R. 276. Def's Exhibit 117).

Appellants and S. P. Company were having a controversy over this same account and whether some items of track damage on it (**not** occurring from appellants' operations) had been repaired for S. P. Company by appellants. Finally appellants commenced this action against both S. P. Company and appellee insurance company, to which action the S. P. Company filed its counterclaim against appellants to recover for the amount of its expenditures in repairing the early track damage. Its main contention for recovery was based on the contractual provision above. Appellee insurance company refused to defend this counterclaim for the appellants. It was the denial of this tendered defense of the counterclaim which gives rise to appellants' specification of error No. 2.

ANSWER TO SPECIFICATION OF ERROR No. 1

The Court, in finding that the damage was operational in nature and not the result of accident, was in the best position to judge the evidence and the credibility of witnesses; there was ample evidence supporting the findings and conclusions reached.

Plaintiffs' witness Lind testified there were 59 items of damage to the track within a distance of some 500 feet, all quite similar in character (R. 158), and 34

items of damage in another section of the work within a distance of 700 feet (R. 159).

Witness Struble, who was government Resident Engineer on the job, testified (R. 181-183):

"Q. In letting this contract for the construction of road was there any provision or any anticipation made for damage to the track which would occur in the operations of the contractor?

A. Not as far as we were concerned; however, we anticipated damage, and we had set up what we thought was the most difficult section, and we estimated at a higher price to take care of the additional cost of construction.

Q. Would that take care of any damage in replacing and repairing track and so on?

A. That is hard to say. I could not answer that because it depends on how much would develop.

Q. Have you had a chance to look at your notes and look at the items of damage claimed?

A. Well, I looked them over yesterday, but ——

Q. How frequently when they were in this close proximity to the track would material come down on the track? Was it a daily occurrence or otherwise?

A. It was pretty general. Throughout both the blasting and the digging of the material it was—perhaps there would be some material would come down nearly every day, and maybe some days there would not be enough to

make a great deal of difference, but probably some material was lost every day.

Q. Where would that material go to?

A. Well, it would generally go down to the railroad track.

Q. And on the track and around the track?

A. Well, sometimes it would stop there. Sometimes it would go clear over, but it would depend on the volume of the material that came down.

Q. There is a river down below part of it there?

A. The river below the railroad track.

Q. So at times some of the material was deliberately shoved down by bulldozer onto the track and another bulldozer down there shoved it off?

A. Quite frequently there was a bulldozer down there shoving it off, yes, not always, but as cuts were being opened up and there would be no chance to control the material it would spill over, and they would have a bulldozer to remove the material.

Q. That bulldozer would be kept right down there along the tracks, would it?

A. Pretty much, pretty frequent, yes.

Q. Who did you look to to remove that material and to protect the track? Whose obligation was that?

A. The contractor's obligation.

MR. POWERS: That is all."

There was only one place for the loose and blasted materials to go as the work was being carried on in two sections of the job and that was upon the track. Witness Staats testified (R.177-178):

"Q. In your inspection of the job and carrying on that, was there any way to get the rocks out other than blasting————?

A. No practical way.

Q. And moving it down? These sections that you saw, what was at the bottom? From your experience where would this rock go?

A. It would go down. It was on a hillside, it had to go down.

Q. What would it go down to; what was down there?

A. Well, the track and the river.

Q. Was there any other place it could go?

A. Well in some places there was a little of it that could hang up on a very narrow county road there. * * *

Q. Mr. Staats, what would be the natural and probable consequences of blasting on a hillside with reference to the tracks down below?

A. Part of the rock, if there was—except for the little that hung up on the county road, it would go down there.

Q. What would be the distance, the average distance between the rock that would go down below and the track itself? Would it be five

feet, ten feet, fifty or a hundred feet? Can you give us the extremes of distance there, Mr. Staats?

A. Well, in some instances it was practically a straight cliff that overhung the railroad, and in other instances it was back maybe, oh, any amount, but it is a narrow canyon."

An over-all reading of the testimony leads to the natural conclusion that these matters were operational in character and not the result of accident. This evidence, together with the contract provision that due to the close proximity of the railroad company's tracks to the excavation work to be done "that some interference with the continuous operation of the railroad and its facilities would seem to be unavoidable," and the further provision that the contrator should include in his "Bid" such anticipated damage and cost of protecting the railroad, keeping the track clear, and removing the debris could lead only to the same conclusion.

It is hard to see how the lower court could have ruled other than it did, and now that the court has made its findings there would seem to be no basis for disturbing those findings in view of Rule 52(a) of the Federal Rules of Civil Procedure:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given

to the opportunity of the trial court to judge of the credibility of the witnesses."

The law was fully briefed to the court below, and it was stated by the court after reading the briefs that he was more convinced than ever that these items of damages were not accidents. Even in the absence of such contract provision, the weight of authority supports the lower court's ruling. It was agreed by all below that if it should be held that the items of damage did not result from accident that would put an end to the case as far as appellants and appellee are concerned.

POINT A

The essential element of an accident or an injury resulting from accident is that the result is unforeseeable.

Springfield Twp. v. Indemnity Insurance Company of North America (1949) 361 Pac. 461, 64 A. 2d 761.

In this case cited by appellants, a sewer authority sued the insurance company on a contractor's liability policy to recover costs and counsel fees expended in defending action brought against it for certain property damages resulting from plaintiffs' blasting operations in the construction of a sewer. The policy insured the authority against liability for,

> "property damage accidentally suffered or alleged to have been suffered . . ."

during construction of a sewer and the insurance company agreed to defend all claims or suits for which the authority is or **is alleged** to be liable. The final holding is not in point for the court expressly held that the insurance company's **ultimate liability** to pay damages was not material to its decision. It was enough for the insurance company's obligation to defend that it be alleged that property damage accidentally occurred. Furthermore, the case does not indicate the frequency of the injuries suffered. The inference is that there were one or two acts over a short period of time as opposed to the instant case where a series of acts over a two year period produced recurring damage of the same character to the same claimant.

The court defined "accident" under a contractor's liability policy. It stated that if accident and negligence are not opposites, they could not be regarded as identical without confusing cause and effect. The court then stated: (p. 762):

> ". . . Accident, and its synonyms, casualty and misfortune, may proceed or result from negligence, or other cause known or unknown.
>
> "That which distinguishes an accident from other events is the element of being unforeseen; an accident is an occurrence which proceeds from an un-

known cause, or which is an unusual effect of a known cause, and hence unexpected and unforeseen."

The results here claimed to be accidents by appellants do not proceed from an unknown cause. The only remaining question is whether or not they can be considered the unexpected and unforeseen results or effects of a known cause. A similar inquiry arose in the case of

United States Fidelity & Guaranty Co. v. Briscoe (Okla, 1951) 239 P. 2d 754,

to which case we shall soon refer. We have found no cases in Oregon on facts similar to those here involved.

The most widely quoted general definition of accident in an insurance policy is found in

United States Mutual Accident Association v. Barry (1889) 131 U.S. 100, 9 S. Ct. 755, 33 L. Ed. 60 (p. 67, 1st col.)

". . . the term 'accident' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected;' that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which pro-

duces the injury, then the injury has resulted through accidental means."

A similar definition has been adopted in Oregon.

Trevethan v. Mutual Life Insurance Co. of New York (1941) 113 P. 2d 621 166 Or. 515, (p. 525).

"The policy contains no definition of the word 'accidental.' The word, therefore, should be given its ordinary, usual and popular signification or meaning, as indicating an event which takes place without one's foresight and expectation, and is not the natural and probably consequence of an ordinary or common act, as distinguished from an event the occurrence of which involved no element of chance or unexpectedness. Couch on Insurance, section 1137. Webster's Unabridged Dict., title 'Accident,' defines the word 'accident' as 'an event which takes place without one's foresight or expectation; an event which proceeds from an unknown cause, and therefore, not expected; chance, casualty, contingency.' The word 'accident' has also been defined as any event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual and unexpected to whom it happened, and took place without the concurrence of the will of the person by whose agency it was caused."

This definition was quoted and approved in

Seater v. Pennsylvania Mutual Life Insurance Co. of Philadelphia (1945) 176 Or. 542, 156 P. 2d 386, 391.

It should be noted that the definitions in the above U. S. Supreme Court and Oregon cases are for accident insurance policies and not liability insurance policies.

POINT B

Injuries resulting from similar acts substantially repeated over a period of time are not accidents.

United States Fidelity & Guaranty Co. v. Briscoe (Okla., 1951) 239 P. 2d 754.

Contractor entered into a contract with the State of Oklahoma to construct 12 miles of cement highway. Part of the operation involved unloading bulk cement from railroad hopper bottom cars into trucks for transportation to work sites. A temporary unloading plant was constructed for this purpose and numerous precautions were taken to prevent the escape of the dry, powdered cement. Soon after commencing operations, a neighboring family complained that the cement dust was escaping from the unloading mill, impregnating the air and causing personal and property injuries. The operations continued and the family brought actions against the contractor who tendered their defense to the insurance company on a liability policy by which the insurance company contracted to insure contractor against liability for injuries to persons or to property "caused by accident." Contractor then brought this

action against the insurance company. In reversing the trial court and remanding the cause with directions to dismiss, the state supreme court stated:

> "Coming then to the question whether there is, in this record, any testimony tending to show that damages to members of the Taylor family were caused by accident, we confront again the troublesome inquiry: What is an accident? And, when is a means or cause accidental, within the meaning of the contract? It is not always easy to define a word, though one of familiar, common and daily use, in other words or terms, which shall, at once, be so clear, accurate and comprehensive, as to be everywhere and always applicable. Attempts to accomplish such a definition quite as often serve to confuse, as to elucidate. One thing, at least, is well settled, the words, 'accident' and 'accidental' have never acquired any technical meaning in law, and when used in an insurance contract, they are to be construed and considered according to common speech and common usage of people generally. Certain it is that no attempt to define these words, in other terms, is, in any respect, an improvement upon the definition found in our standard lexicons, and from these, by way of illustration, we quote from Webster's International Dictionary:
>
> 'Accident. An event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event, chance, contingency.'
>
> 'Accidental' means Happening by chance or

unexpectedly, Undesigned; unintentional; unforeseen, or unpremeditated.'

This is also the meaning, given to these words in United States Mutual Accident Ass'n v. Barry, 131 U. S. 100, 9 S. Ct. 755, 33 L. Ed. 60. It is an event from an unknown cause, or an unexpected event from a known cause." (p. 756, 2d col., middle).

"In an etymological sense, anything that happens may be said to be an accident, and, in this sense, the word has been defined as befalling; a happening; an incident; an occurence or event. It is true that if contractor performs or does a voluntary act, the natural, usual, and to-be-expected result of which is to bring injury or damage upon himself, then resulting damage, so occurring, is not an accident, in any sense of the word, legal or colloquial." (p. 757, 1st col., bottom).

"Taking into consideration all of the facts and circumstances, we are of the opinion, and so hold, that the claims asserted against contractor were not predicated on, or caused by accident, and not within the coverage of insurance policy, sued upon. They were predicated upon a series of acts, which continued approximately four months, and, at all times, voluntary, intentional, tortious and wrongful, resulting from negligent conduct of contractor." (p. 758, 2d col., top).

In that case, the insured began a course of action when injuries to neighboring area should have been anticipated and continued the same course of action

for a considerable period after injuries resulted and were brought to the attention of the contractor. In the instant case, the language of the bid proposal brought the probability of damage to the attention of appellants and in addition, appellants, as experienced road-building contractors, should be held to have known of the probable results of blasting operations.

C. Y. Thomason Co. v. Lumbermens Mutual Casualty Co. (CA, 4th, 1950) 183 F. 2d 729.

Contractor contracted to build a highway for the South Carolina Highway Department and agreed to hold harmless the county, state, city of Florence and the state highway department. It obtained a policy of insurance against accidents. Contractor excavated the area in front of a garage, a place of business, owned by one Turner in the City of Florence. The excavation was left open for about a year. During this time and as a result of the excavation, earth was washed into the garage, water flowed into the area and Turner's business and property were substantially injured. Turner filed action against the contractor who called upon his insurer to defend. Insurer refused and brought this declaratory judgment action to determine its liability under the contract.

In affirming the trial court and holding the injuries

to Turner not to be accidents, the court stated. (p. 732, 2nd col., bottom):

> ". . . the contractor's actions that interfered with the business of the garage . . . were intentional, deliberate, long continued and unnecessary, consisting perhaps of negligence but devoid of any suggestion of accident.
>
> ". . . We are not confronted with the difficult problem of distinguishing between an accidental cause and an accidental result which sometimes arises when an unfortunate and unexpected event occurs and it becomes necessary to determine whether the cause or the result of the occurrence was accidental. In our case, neither the means nor the result was accidental, since the acts which caused the damage were persistently and continuously done and the results were the normal consequences of the acts."

The above language precisely fits the actions of appellants herein. Frequent and continued acts of the same essential nature with knowledge of their injurious consequences are directly opposed to a finding that the results were "caused by accident."

Neale Construction Co. v. United States Fidelity & Guaranty Co. (CA, 10th, 1952) 199 F. 2d 591.

Contractor contracted with a telephone company and an electric company to perform certain work in Texas on the telephone system. Actions filed against contractor alleged essentially that the contractor had

performed its work negligently and in an improper manner. Contractor notified its liability insurance company to come in and defend. The insurance company refused. Trial resulted in judgment against contractor which brought this action against the insurance company. It was conceded that liability of the insurance company would be predicated on the determination as to whether the damage was caused by accident. In affirming judgment of the trial court in favor of the defendant insurance company, the court held: (p. 593, 1st col., top):

> "The term 'accident' as used in policies of insurance has been variously defined. A good definition is found in Gilliland v. Ash Grove Lime & Portland Cement Co., 104 Kan. 771, 189 P. 793, 794, as follows: **'An "accident" is simply an undesigned, sudden and unexpected event,** usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force.' The natural and ordinary consequences of a negligent act do not constitute an accident. If one negligently erects a roof by the use of weak or inadequate rafters, the roof is liable to collapse but its fall is not an accident because such is the ordinary result of such construction. Here certain standards were required for these installations. Because of the negligent manner in which the wires were spun certain damage resulted, such as permitting the cables to sag and even creating the hazards of broken spinning wires, but these results were the usual, ordinary and expected results of such negli-

gent construction. Such results were in no sense sudden, unexpected or unanticipated. When the means used and intended to be used produces results which are their natural and probable consequences, there has been no accident although such results may not have been intended or anticipated."

As in the above case, it is submitted that the damages resulting from appellants' operations were in no sense sudden, unexpected or unanticipated. The means used under the circumstances produced results which were their natural and probable consequences.

See also,

Langford Electric Co., Inc., v. Employers Mutual Indemnity Corp., 210 Minn. 289, 297 N.W. 843.

POINT C

One engaging in blasting operations in the course of regular business is held to know or to foresee that injury to closely adjacent property will result.

It needs no lengthy citation of authority to support the proposition that the act of blasting raises a high degree of certainty that certain injuries to property in the neighboring area will be caused by falling rock and debris.

It is for this reason that the rule has been established that blasting is an inherently dangerous opera-

tion and is conducted subject to the obligation to pay damages for any injury inflicted by the blasting.

35 Corpus Juris Secundum 238 (Explosives, sec 8.a)

"One lawfully engaged in blasting operations is, according to the weight of authority, liable without regard to the question of whether or not he has been negligent, where by his acts in casting rocks or other debris on adjoining or neighboring premises or highways he causes direct injury or damage to property or causes direct injury or damage to persons thereon. He is also, under the rule more generally adopted, liable for consequential injuries occasioned by concussion or vibration to property or persons; nor is the rule restricted in application to instances where the blasting is a nuisance per se or where the property is contiguous or adjoining."

To the same effect, see

22 American Jurisprudence 175-182,

which authority, after defining the duty of a person using a powerful explosive in blasting, states as follows: (p. 175):

"Moreover, such a person is charged with knowledge of any fact in reference to the actual effect of a powerful explosive that he could by resonable diligence have ascertained."

See, also,

35 American Law Reports 1244.

The prospect of injury to railroad tracks lying immediately adjacent to the downhill from the site of blasting operations must be held to have been obvious to appellants who are experienced road building contractors.

POINT D

None of the cases cited by plaintiffs finding injuries caused by "accident" involve situations where frequent injuries resulted from substantially the same cause and the continuation of a similar course of conduct after the injuries manifested themselves.

Appellants rely mainly upon:

Cross v. Zurich General Accident & Liability Insurance Co., 184 F. 2d 609.

The court held in that case that the possibility that the plaintiffs were merely negligent in failing to take sufficient precautions to prevent injury to a building by hydrofluoric acid does not prove intent to damage and concludes as follows on p. 611:

> "* * * and lacking such intent, that the damage was accidental, even though caused by negligence."

The court found that the use of steam with hydrofluoric solution was a customary method of cleaning

buildings, and the wetting of windows during the cleaning process was a customary protection against acid damage. In the case presently at issue, if there had been but one injury the Zurich case might be some authority for holding that said injury was caused by accident, but that is not the case here at issue. There were frequent injuries to adjacent property resulting from the same substantial cause, blasting, and the same course of action continued in a similar manner. While one injury under the conditions found at the time and place of the blast despite usual precautions might be regarded as being unforeseen and, therefore, "caused by accident," a series of injuries running as high as 59 separate items of damage at one area over a two year period cannot be regarded as having been caused by accident, because the prospect of damage must be regarded as being foreseen by any reasonable person in the position of appellants. In the Zurich case, had the assured building cleaning contractor continued to employ this same cleaning method in other buildings resulting in a series of similar injuries, it can hardly be seriously contended that that court would have held such injuries to be caused by accident.

In the case of **Huntington Cab Co. v. American Fidelity and Casualty Co.,** 155 F. 2d 117, an assault and battery case, the court stated:

"If the injury is caused by the insured himself or by his employee with his authority or consent, it is not accidental and so coverage is denied; but where an intentional injury is inflicted by an employee of the assured without the latter's authority or consent, it is generally held, a few decisions to the contrary, that the injury is suffered as the result of an accident within the meaning of the contract of insurance."

Appellants cite numerous authorities growing out of assault-and-battery cases. These generally hold that had the assault and battery been committed by the named insured or under his knowledge and consent no valid insurance could be written to cover such intentional harm. Possibly one exception to this is New Amsterdam Casualty Co. v. Jones, 135 F. (2d) 191.

It is thus apparent that the assault and battery cases cited bear two important distinguishing characteristics from the case at issue herein:

1. The act causing injury was committed by an employee of the named insured without any authorization, knowledge, or acquiescence of the employer. Such has **never** been contended by the appellants herein.

2. Said cases do not involve recurring acts producing similar injuries with considerable frequency.

Appellants use as an authority a quotation from the "Society of Chartered Property and Casualty Under-

writers" apparently written on June 29, 1949. We certainly cannot agree with appellants that this constitutes any law. The quoted matter is simply an expression of opinion on one side of a forum conducted by that society and has no weight either as law or as an expression of expert opinion by said society. It may be well to note that that expression of opinion must have been contrary to the general view, as the suggestion has not been followed by insurance companies; and since then and up to now this type of insurance policy continues to be written on an "accident" basis.

Respecting this point, it is respectfully submitted, the damage resulting to the railroad company's tracks and roadbed is not accidental but is operational in the truest sense of the word.

Appellants' bid on this contract was based upon an expectation of such damage which was also within the contemplation of the other interested parties, as evidenced by the Proposal and Contract previously referred to. Appellants were awarded the contract and entered into the required agreement with Southern Pacific Company to reimburse them for any and all damages thereby caused. Thereafter appellants commenced operations, observed the injurious results of their activities and continued to blast.

The results of the continued operations with knowl-

edge of the inevitable consequences could not be said to have been "caused by accident."

ANSWER TO SPECIFICATION OF ERROR No. 2
ARGUMENT

The appellants in filing their action against Southern Pacific Company and also against appellee as co-defendants were actually trying to avoid their obligation to pay the railroad for the damage which they had done at the beginning of the job and which under the contract they were bound to pay for. By their action appellants were attempting to work up an offset defense to Southern Pacific Company's contractual claim against them. (R. 276, Defendants' Exhibit 117).

The appellants having started the litigation, there was no duty on the part of the appellee insurance company to defend appellants respecting their contractual obligations. It was the first contention of the Southern Pacific Company that the matter arose out of a contractual obligation. (R. 32).

> "It is the contention of defendant Southern Pacific Company that all the work performed and material furnished by plaintiffs were work and materials which the plaintiffs were obligated to perform or to pay for by reason of the contracts between plaintiffs and Southern Pacific Company."

The appellee insurance company also took the posi-

tion that the matter was a contractual obligation and the appellants were liable (R. 36).

> "The Hartford agrees with the contention made by the Defendant Southern Pacific Company that the work performed and materials furnished by plaintiffs was all done pursuant to contracts between plaintiffs and Southern Pacific Company and for which the plaintiffs were expressly obligated to perform and to pay for."

The matter arose on a counterclaim which Southern Pacific Company filed in said action, and there is no obligation on the part of the appellee to defend appellants against such counterclaim. The appellants had violated the policy of insurance by suing the insurance company (R. 18) and had failed to meet the conditions of the policy respecting notice (R. 17). It borders on absurdity to contend that an insured could file an action against the insurance company in which the insurance company must defend under a denial of liability on the basis that the matter does not arise out of tort liability but under a contract, and then expect the insurance company to take an opposite position against the co-defendant. The net effect of appellants' position here would require the insurance company to take the position of both a plaintiff and a defendant in the same action, which would be manifestly ridiculous.

The cases cited by appellants are not in point and

do not support their position; they relate to actions filed against an insured and do not relate to an action such as we have here commenced by an insured.

It is respectfully submitted that the lower court's ruling was correct and should not be disturbed and that the judgment of the lower court should be affirmed.

Respectfully submitted,

JAMES ARTHUR POWERS,
Attorney for Appellee.